From: Eric Merritt
To: Microsoft ATR
Date: 1/23/02 8:53am
Subject: Microsoft Settlement

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Dear Sirs,

I have a few issues with the Microsoft Antitrust
resolution and I am taking this opportunity to voice
them.

Section III.H.3. of the PFJ requires vendors of
competing middleware to meet "reasonable technical
requirements" seven months before new releases of
Windows, yet it does not require Microsoft to disclose
those requirements in advance. This allows Microsoft
to bypass all competing middleware simply by changing
the requirements shortly before the deadline, and not
informing ISVs. In this case, this section is no
solution at all. It is simply
a way for microsoft to justify it anitcompetitive
practices by saying it is conforming to the PFJ.

Section III.D. of the PFJ requires Microsoft to
release via MSDN or similar means the documentation
for the APIs used by Microsoft Middleware Products to
interoperate with Windows; release would be required
at the time of the final beta test of the covered
middleware, and whenever a new version of Windows is
sent to 150,000 beta testers. But this information
would almost certainly not be released in time for
competing middleware vendors to adapt their products
to meet the requirements of section III.H.3, which
states that competing middleware can be locked out if
it fails to meet unspecified technical requirements
seven months before the final beta test of a new
version of Windows. Once again the same issues as
above.

The PFJ's overly narrow definitions of "Microsoft
Middleware Product" and "API" means that Section
III.D.'s requirement to release information about
Windows interfaces would not cover many important
interfaces.

ISVs writing competing operating systems as outlined
in Findings of Fact (52) sometimes have difficulty
understanding various undocumented Windows APIs. The
information released under section III.D. of the PFJ
would aid those ISVs -- except that the PFJ disallows
this use of the information. Worse yet, to avoid
running afoul of the PFJ, ISVs might need to divide up
their engineers into two groups: those who refer to
MSDN and work on Windows-only applications; and those

who cannot refer to MSDN because they work on
applications which also run on non-Microsoft operating
systems. This would constitute retaliation against
ISVs who support competing operating systems.

No part of the PFJ obligates Microsoft to release any
information about file formats, even though
undocumented Microsoft file formats form part of the
Applications Barrier to Entry (see "Findings of Fact"
20 and 39).

Section III.I of the PFJ requires Microsoft to offer
to license certain intellectual property rights, but
it does nothing to require Microsoft to clearly
announce which of its many software patents protect
the Windows APIs (perhaps in the style proposed by the
W3C; see
http://www.w3.org/TR/2001/WD-patent-policy-20010816/#sec-disclosure).
This leaves Windows-compatible operating systems in an
uncertain state: are they, or are they not infringing
on Microsoft software patents? This can scare away
potential users, as illustrated by this report from
Codeweavers, Inc.:
When selecting a method of porting a major application
to Linux, one prospect of mine was comparing Wine [a
competing implementation of some of the Windows APIs]
and a toolkit called 'MainWin'. MainWin is made by
Mainsoft, and Mainsoft licenses its software from
Microsoft. However, this customer elected to go with
the Mainsoft option instead. I was told that one of
the key decision making factors was that Mainsoft
representatives had stated that Microsoft had certain
critical patents that Wine was violating. My customer
could not risk crossing Microsoft, and declined to use
Wine. I didn't even have a chance to determine which
patents were supposedly violated; nor to disprove the
validity of this claim. The PFJ, by allowing this
unclear legal situation to continue, is inhibiting the
market acceptance of competing operating systems.

The PFJ prohibits certain behaviors by Microsoft
towards OEMs, but curiously allows the following
exclusionary practices:

Section III.A.2. allows Microsoft to retaliate against
any OEM that ships Personal Computers containing a
competing Operating System but no Microsoft operating
system.

Section III.B. requires Microsoft to license Windows on uniform terms and at published prices to the top 20 OEMs, but says nothing about smaller OEMs. This leaves Microsoft free to retaliate against smaller OEMs, including important regional 'white box' OEMs, if they offer competing products.

Section III.B. also allows Microsoft to offer unspecified Market Development Allowances -- in effect, discounts -- to OEMs. For instance, Microsoft could offer discounts on Windows to OEMs based on the number of copies of Microsoft Office or Pocket PC systems sold by that OEM. In effect, this allows Microsoft to leverage its monopoly on Intel-compatible operating systems to increase its market share in other areas, such as office software or ARM-compatible operating systems.

By allowing these practices, the PFJ is encouraging Microsoft to extend its monopoly in Intel-compatible operating systems, and to leverage it into new areas.

Sections III.F. and III.G. of the PFJ prohibit certain exclusionary licensing practices by Microsoft towards ISVs.

However, Microsoft uses other exclusionary licensing practices, none of which are mentioned in the PFJ. Several of Microsoft's products' licenses prohibit the products' use with popular non-Microsoft middleware and operating systems. Two examples are given below.

The Microsoft Windows Media Encoder 7.1 SDK EULA states
... you shall not distribute the REDISTRIBUTABLE COMPONENT in conjunction with any Publicly Available Software. "Publicly Available Software" means each of (i) any software that contains, or is derived in any manner (in whole or in part) from, any software that is distributed as free software, open source software (e.g. Linux) or similar licensing or distribution models ... Publicly Available Software includes, without limitation, software licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: GNU's General Public License (GPL) or Lesser/Library GPL (LGPL); The Artistic License (e.g., PERL); the Mozilla Public License; the Netscape Public License; the Sun Community Source

License (SCSL); ... Many Windows APIs, including Media
Encoder, are shipped by Microsoft as add-on SDKs with
associated redistributable components. Applications
that wish to use them must include the add-ons, even
though they might later become a standard part of
Windows. Microsoft often provides those SDKs under End
User License Agreements (EULAs) prohibiting their use
with Open Source applications. This harms ISVs who
choose to distribute their applications under Open
Source licenses; they must hope that the enduser has a
sufficiently up-to-date version of the addon API
installed, which is often not the case.

Applications potentially harmed by this kind of EULA
include the competing middleware product Netscape 6
and the competing office suite StarOffice; these EULAs
thus can cause support problems for, and discourage
the use of, competing middleware and office suites.
Additionally, since Open Source applications tend to
also run on non-Microsoft operating systems, any
resulting loss of market share by Open Source
applications indirectly harms competing operating
systems.

The Microsoft Platform SDK, together with Microsoft
Visual C++, is the primary toolkit used by ISVs to
create Windows-compatible applications. The Microsoft
Platform SDK EULA says:
"Distribution Terms. You may reproduce and distribute
... the Redistributable Components... provided that
(a) you distribute the Redistributable Components only
in conjunction with and as a part of your Application
solely for use with a Microsoft Operating System
Product..." This makes it illegal to run many programs
built with Visual C++ on Windows-compatible competing
operating systems.

By allowing these exclusionary behaviors, the PFJ is
contributing to the Applications Barrier to Entry
faced by competing operating systems.

The PFJ places restrictions on how Microsoft licenses
its products to OEMs, but not on how it licenses
products to large users such as corporations,
universities, or state and local goverments,
collectively referred to as 'enterprises'. Yet
enterprise license agreements often resemble the
per-processor licenses which were prohibited by the
1994 consent decree in the earlier US v. Microsoft

antitrust case, in that a fee is charged for each
desktop or portable computer which could run a
Microsoft operating system, regardless of whether any
Microsoft software is actually installed on the
affected computer. These agreements are
anticompetitive because they remove any financial
incentive for individuals or departments to run
non-Microsoft software.

MSNBC (a subsidiary of Microsoft) offers software
called NewsAlert. Its EULA states
"MSNBC Interactive grants you the right to install and
use copies of the SOFTWARE PRODUCT on your computers
running validly licensed copies of the operating
system for which the SOFTWARE PRODUCT was designed
[e.g., Microsoft Windows(r) 95; Microsoft Windows
NT(r), Microsoft Windows 3.x, Macintosh, etc.]. ..."
Only the Windows version appears to be available for
download. Users who run competing operating systems
(such as Linux) which can run some Windows programs
might wish to run the Windows version of NewsAlert,
but the EULA prohibits this.

MSNBC has a valid interest in prohibiting use of
pirated copies of operating systems, but much narrower
language could achieve the same protective effect with
less anticompetitive impact. For instance,
"MSNBC Interactive grants you the right to install and
use copies of the SOFTWARE PRODUCT on your computers
running validly licensed copies of Microsoft Windows
or compatible operating system."

An episode from the 1996 Caldera v. Microsoft
antitrust lawsuit illustrates how Microsoft has used
technical means anticompetitively.

Microsoft's original operating system was called
MS-DOS. Programs used the DOS API to call up the
services of the operating system. Digital Research
offered a competing operating system, DR-DOS, that
also implemented the DOS API, and could run programs
written for MS-DOS. Windows 3.1 and earlier were not
operating systems per se, but rather middleware that
used the DOS API to interoperate with the operating
system. Microsoft was concerned with the competitive
threat posed by DR-DOS, and added code to beta copies
of Windows 3.1 so it would display spurious and
misleading error messages when run on DR-DOS. Digital
Research's successor company, Caldera, brought a

private antitrust suit against Microsoft in 1996. (See
the original complaint, and Caldera's consolidated
response to Microsoft's motions for partial summary
judgment.) The judge in the case ruled that
"Caldera has presented sufficient evidence that the
incompatibilities alleged were part of an
anticompetitive scheme by Microsoft." That case was
settled out of court in 1999, and no court has fully
explored the alleged conduct.

The concern here is that, as competing operating
systems emerge which are able to run Windows
applications, Microsoft might try to sabotage Windows
applications, middleware, and development tools so
that they cannot run on non-Microsoft operating
systems, just as they did earlier with Windows 3.1.

The PFJ as currently written does nothing to prohibit
these kinds of restrictive licenses and intentional
incompatibilities, and thus encourages Microsoft to
use these techniques to enhance the Applications
Barrier to Entry, and harming those consumers who use
non-Microsoft operating systems and wish to use
Microsoft applications software.

Please do not allow this PFJ as it is currently worded